91-1546

No. 91-1270

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BOB SLAGLE,
Appellant

vs.

LOUIS TERRAZAS, et.al.
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT FOR APPELLANT BOB SLAGLE

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QUESTIONS PRESENTED

1. Whether a court-imposed interim plan for redistricting state legislative districts which contains a total maximum deviation of 9.98% violates constitutional standards.

2. Whether the following actions of a district judge give rise to an appearance of impropriety sufficient to require reversal, to wit: 1) the judge testified as an expert witness for Plaintiff Terrazas in a previous redistricting case; the Judge's law clerk was previously employed by Plaintiff Craddick, the Judge engaged in material ex parte communications with interested persons; the Judge allowed a personal friend and primary candidate to designate part of the redistricting plan, and the judge has instructed an attorney to appear as his personal counsel at a deposition in this cause.

3. Whether a court-ordered redistricting plan which is based primarily on a proposed plan submitted by a party to the litigation is subject to the preclearance requirement of Section 5 of the Voting Rights Act.

LIST OF PARTIES

Plaintiffs

Louis Terrazas
Ernest Angelo, Jr.
Tom Craddick

Plaintiff-Intervenors

Sim D. Stokes III
Robert A. Estrada
David Sibley
Bill Sims
Eddie Lucio, Jr.

Defendants

Ann Richards, Governor of Texas
Dan Morales, Attorney General of Texas
John Hannah, Jr.,
Secretary of State of Texas
Bob Slagle
Fred Meyer

Intervenors for limited purposes

Sharon Gilbert
Jo Ann Reyes
Royla Cox
Bruce Auld
Fred W. Davis
Jeff Walker
R. E. Thornton
Bob Aikin
Doyle Willis, Jr.

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TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinions below are the Summary Opinion and Judgment of December 24, 1991, the Order and Judgment of January 10, 1992, the Amended Order and Judgment of January 13, 1992, the Amended Order and Judgment of January 16, 1992, and the Amended Order and Judgment of January 24, 1992. None is reported. These orders are reproduced in the Appendix to this Jurisdictional statement at pages 1a, 50a, 82a, 86a and _____ respectively.

JURISDICTION

The three-judge court below was convened pursuant to 28 U.S.C.§2284(a). The preliminary injunction orders which Appellant challenges herein were issued on December 24, 1991, and January 10, 1992, as amended on January 13, 16, and 24, 1992.

Appellant filed timely notice of appeal on January 23, 1992. (Appendix p. 90a) Accordingly, this court has jurisdiction of this appeal pursuant to 28 U.S.C. §1253 and 42 U.S.C. §1973(c).

STATUTES INVOLVED

The principal federal statutes involved are Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§1973 and 1973(c). They are reproduced in the Appendix to this Jurisdictional statement at pages 93a and 95a.

STATEMENT OF THE CASE

The statement of the case contained in the State Appellant's Jurisdictional Statement accurately reflects the procedural history of this case. Appellant, therefore, adopts and hereby incorporates that statement of the case as though fully set forth herein. There are,

however, additional matters relevant to the issues raised in this appeal. These are set forth below.

On July 1, 1991, Appellant filed a motion to recuse Judge Nowlin, pointing out that Judge Nowlin had testified on behalf of Plaintiff Terrazas ten years ago in a case involving a Republican challenge to the redistricting plan adopted after the 1980 census (Application for Stay, Appendix C, Attachment E).[1] This motion was denied without a hearing.

On January 23, 1992, Appellant filed his second motion to recuse, re-urging the fact that Judge Nowlin's partisan Republican affiliations, and in particular his previous testimony on behalf of Terrazas, created the

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[1] Because they are voluminous, the documents previously provided to the Court in Appellant's Application for Stay will not be attached to the Jurisdictional Statement

appearance of partiality by Judge Nowlin. The motion further asserted that George Pierce, a Republican Primary candidate in Senate District 26, had assisted the court in drawing the court-ordered interim plan, and that this gave rise to an appearance of impropriety sufficient to require recusal. (Application for Stay, Appendix C, Attachment E). On February 5, 1992, this motion was summarily denied without a hearing.

On February 7, 1992, Appellant filed a motion asking the full three-judge court to review Judge Nowlin's failure to recuse (Application for Stay, Appendix C, Attachment F). A hearing was requested. Rather than submit the motion to the full court, Judge Nowlin denied the motion without a hearing.

As evidence began to mount regarding the extent and materiality of ex parte communications between

court personnel and Republican partisans, the State Appellants noticed the depositions of Judge Nowlin's law clerks. By his order of February 10, 1992, Judge Sam Sparks refused to allow any questioning of the law clerks, finding, in essence, that ex parte communications are privileged.

While both Appellant and the State have been frustrated in their attempts to gather evidence relevant to the recusal issue, it is apparent that the deliberative process by the panel below has been tainted by outside influence. New evidence continues to surface, and it has been sufficiently compelling to persuade the Judicial Council of the Court of Appeals to order a panel of judges to conduct an exhaustive investigation into these matters. This investigation is ongoing.

On February 14, 1992, Appellant filed his motion to vacate the substantive orders entered in this case to date, and requested a hearing on the motion (Application for Stay, Appendix C). There has been no hearing, and no ruling on the motion.

On February 17, 1992, Appellant filed with this Court his Emergency Application for Stay pending appeal, asking this court to stay the Texas Senate primary election. The application was denied by order of February 19, 1992. Justices Stevens and Blackmun would have granted the stay.

THE QUESTIONS ARE SUBSTANTIAL

This Court has repeatedly emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination." E.g. Reynolds v. Sims, 377 U.S. 533, 586 (1964). The Court

has acknowledged that exceptional circumstances may require a federal court to intrude on the process. In these circumstances however,

> the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner free from any taint of arbitrariness or discrimination.

Connor v. Finch, 431 U.S. 407, 415 (1977). The court below has ignored this admonition with respect to both the substance of its plan and the process by which it was devised.

The result is that the entire state of Texas, with a population of 16,986,510 persons, is forced to proceed with State Senate elections under a federal court-ordered plan which is constitutionally infirm on its face, which fails to comply with the Voting Rights Act, and which is

wholly tainted by both the partisan bias of Judge Nowlin and the extensive, material ex parte communications.

The questions presented are not only important for the people of Texas, however. The conduct of Judge Nowlin has received widespread notoriety, and has undermined confidence in the federal judicial system.

Moreover, the district court's unjustified usurpation of the state's right to reapportion itself, whether motivated by bias or not, destroys the finely crafted balance of federal-state relations fashioned by this Court over a period of decades. It is imperative that this Court act now to re-adjust this balance, to resurrect the integrity of the federal judiciary and to protect the constitutional and statutory rights of almost seventeen million Texans.

I.
THE COURT-ORDERED PLAN FAILS TO SATISFY CONSTITUTIONAL ONE PERSON-ONE VOTE STANDARDS

The court-imposed Senate plan, adopted in a split decision of the three judge panel, contains a maximum population deviation of 9.98% between Senate District 22 and Senate District 25. (Application for Stay, Appendix C, Attachment A). This far exceeds the constitutional standard for a court-imposed plan. Therefore, the plan is constitutionally infirm and the orders requiring its implementation must be vacated.

The relevant standard was declared by this Court in Chapman v. Meier, 470 U.S. 1 (1974):

> [A] court-ordered reapportionment plan of a state legislature...must ordinarily achieve the goal of population equality with little more than de minimis variation. Where important and significant state considerations rationally mandate

> departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.

Id at 26-27. See also Connor v. Finch, 431 U.S. at 418.

In Wyche v. Madison Parish Policy Jury, 635 F.2d 1151 (5th Cir. 1981), the Fifth Circuit applied the Chapman - Connor standard to a court-imposed plan. After noting the de minimis standard, the court held that the deviation embraced by the plan, 8.2%, was "far more than de minimis." Id. at 1159. Therefore, the plan was deemed unconstitutional.

As noted above, if the court below was unable to devise a plan with de minimis deviation, it was required to explain precisely why the deviation was unavoidable. Chapman 427 U.S. at 27. Moreover, this Court has

strongly intimated that the explanation must be grounded on state policy considerations. Id.; See also Swann v. Adams, 385 U.S. 440, 444 (1967).

In the present case, the court imposed plan, with a deviation of 9.98%, fails to meet constitutional standards. Moreover, the three-judge court failed to articulate a single reason to justify its failure to fashion a constitutional plan with reference to state policy considerations. Therefore, the orders calling for implementation of this plan must be vacated.

In the court below, Plaintiffs have cited Watkins v. Mabus, 771 F.Supp. 789 (S.D. Miss. 1991), aff'd. __U.S.__, 112 S.Ct. 412 (1992), for the proposition that the fact that the court imposed plan is an interim plan renders constitutional requirements inapplicable. Plaintiffs have misconstrued the holding in Watkins, and

their reliance on it is misplaced. The critical difference between Watkins and the present case is that the plan in Watkins was not a a plan drawn and imposed by the court. Therefore, in Watkins, the de minimus standard did not apply. In the present case the plan is a court plan, and is subject to the de minimus standard.

In Watkins, the district court found that it had insufficient time to hear evidence, and insufficient time to prepare a plan. Moreover, the court's review of plans proposed by the parties revealed that none were acceptable. Given this state of affairs, the district court deemed it appropriate to allow the impending elections to proceed under the pre-existing legislatively drawn lines, even though the lines were ten years old, and thus failed to satisfy either constitutional or Voting Rights Act standards. Thus the court properly deferred to the

state's legislative choices, albeit the ones made ten years ago.

Thus, contrary to Appellees' representations, Watkins does not stand for the proposition that the mere fact that the court's plan is presently termed an "interim plan" prohibits the application of constitutional principles. It is true that this Court has upheld interim plans which failed to satisfy constitutional or statutory standards in situations in which the court had no time to prepare a valid plan. In the present case, however, the court did have the time to fashion a plan. The court conducted a full-scale evidentiary hearing lasting four days. Numerous exhibits were introduced, and extensive expert testimony was given. After the hearing, the court spent several days working on its plan. When its plan was issued, the court represented that it was a superior

plan which should supplant the plan of the Texas Legislature. Clearly, this is not a situation in which the court acknowledged that a lack of time prevented the development of a plan which satisfied legal standards.

Finally, the court in Watkins did acknowledge the deficiency in its plan, and justified it with reference to specific state policy interests. In the present case, the district court failed to acknowledge the constitutional deficiency embraced by its plan, and wholly failed to justify the unacceptable deviation with reference to legitimate state concerns. The belated attempts of counsel to justify the plan do not rehabilitate the court's failure to do so. This plan fails to satisfy constitutional standards, the failure is not justified and the orders and judgments calling for its implementation must be reversed.

II.

THE CONDUCT OF JUDGE NOWLIN GIVES RISE TO AN APPEARANCE OF IMPROPRIETY WHICH IS SUFFICIENT TO REQUIRE THAT THE SUBSTANTIVE ORDERS OF THE COURT BELOW BE VACATED

Questions of disqualification must be viewed under an objective standard. That is, disqualification is required if a reasonable man who was aware of all of the relevant circumstances would harbor doubts about a judge's impartiality. E.g. Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986) aff'd _____ U.S. ____, 108 S.Ct. 2194 (1988). See also Code of Judicial Conduct, Canon 3(c)(1). This is true even if the judge is, in fact, impartial. Liljeberg, 796 F.2d at 802; Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983). As outlined below, the evidence of judicial impropriety in this case is overwhelming,

uncontroverted and clearly sufficient to cause a reasonable man to doubt Judge Nowlin's impartiality.

In his order of January 27, 1992, unsealing the court's computer files previously closed from public scrutiny, Judge Nowlin stated that "no representative or employee of this Court has accessed them (the Legislative Council's computer files) since December 24, 1991, nor has the Court given authorization for such access at any time other than to designated employees of the Court."

On February 3, 1992, George Pierce, Republican primary candidate in Senate District 26, clearly contradicted Judge Nowlin's assertion by testifying that Judge Nowlin personally requested Pierce's assistance in preparing the plan, and that Pierce used the computers of the Texas Legislative Council to accomplish his

changes. (Application for Stay, Appendix C, Attachment B). Pierce admitted that he communicated with both Judge Nowlin and his law clerks regarding the subject matter of this lawsuit (Id.) Pierce also acknowledged that he is a close, 25-year friend of Judge Nowlin (Id.) In his deposition testimony in the original Terrazas case, Judge Nowlin described himself as a political consultant to George Pierce (Id. Attachment C, pp 243-44).

The phone records of Pierce's state office reflect that, between December 16 and December 24, 1991, twenty-three phone calls were made from Pierce's office to either Judge Nowlin's home or his office. Twelve of these calls were made on December 23 or 24, 1991, in the critical twenty-four hour period prior to the issuance of the court's Summary Opinion and Judgment of December 24, 1991. (Id., Attachment D) Additional

calls were made from Pierce's office to Mr. Jim Duncan, political director of the Republican Party and the law offices of John McCamish, counsel for both the Terrazas Plaintiffs and various Republican Party Affiliates (Id.)

Pierce maintained at his deposition that his ex parte involvement was solely to correct data errors and the identify the boundaries of municipalities. However, this assertion has been flatly refuted by the statements of Legislative Council personnel. There were no errors in the data, and the boundaries of the municipalities in question, Alamo Heights and Terrell Hills, were clearly established on the computer and well known to all involved (Id. Attachment E, Affidavit of Tina M. Hengst; Attachment F, Affidavit of Bryan Murdock). Moreover, the computer records establish that the changes made by Pierce were detrimental to Pierce's

primary opponents (Id. Attachment G, Affidavit of Chris Sharman).

In the court below, the Republican Plaintiffs have attempted to counter this evidence by asserting that the court was working on two plans, and that the plan Pierce worked on was not the plan that ultimately became the court-ordered plan. This distinction does not benefit Plaintiffs; nor does it cure the clear impropriety of Judge Nowlin's actions. First, the issue of whether the impropriety actually affected the disposition of the case is irrelevant to the question of whether recusal is required. Second, Plaintiff's argument ignores the fact that changes can be transferred from one plan to another on the computer with a single entry. Indeed, the investigative report prepared by the Attorney General of Texas and forwarded to the investigative committee of

the Fifth Circuit Judicial Council establishes that the substantive changes made by Pierce were later incorporated in large part into the court-imposed plan.

Even if the communications with Mr. Pierce had been simply the result of the court's good faith efforts to obtain technical advice, the communications were nevertheless improper. If the court required assistance, it had a duty to "give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond." Code of Judicial Conduct, Canon 3(B)(7)(b). In the present case, the court neither notified the parties nor sought their input regarding the extensive and material ex parte communications with Pierce. Other evidence indicates that Alan Schoolcraft, a primary opponent of Pierce, also communicated with the court.

Moreover, other evidence indicates that the ex parte communications may extend beyond Pierce to include actual parties to the litigation. The deposition testimony of Senator Bob Glasgow indicates that Republican Senator David Sibley, a party to this action, also obtained knowledge of the content of the court-ordered plan prior to its issuance through ex parte communications (Id. Attachment H, Excerpts from the Deposition of Senator Glasgow)

Recently, Appellant has learned that one of Judge Nowlin's law clerks, J. D Munn, was previously employed by Tom Craddick, one of the Republican Plaintiffs in the court below. The relationship between Munn and Plaintiff Craddick was not previously disclosed and Mr. Munn performed substantial work on the Court plan. The existence of the relationship serves

to substantially increase the already imposing appearance of impropriety.

Finally, Judge Nowlin has retained Roy Minton, a prominent local attorney, to represent his interests in the case below. On February 24, 1992, Mr. Minton appeared on behalf of Judge Nowlin at the deposition of Carl Stringfellow (Appendix p. 101a). This deposition was taken by the Plaintiffs as discovery in this cause. Judge Nowlin's reasons for requiring personal counsel to the court to appear at a deposition in a cause pending before him were not disclosed. If Judge Nowlin had merely a judicial interest in this deposition, it would have been appropriate to appoint a special master to attend. Instead, Judge Nowlin retained private counsel and instructed him to appear at the deposition. A reasonable

person aware of that fact would have to conclude that the judge has a personal interest in the litigation.

Despite the overwhelming nature of the evidence outlined above, Judge Nowlin has repeatedly refused to grant Motions to Recuse. To protect both the parties and the integrity of the federal judicial system, the only appropriate remedy in this situation is to vacate the judgment entered by the court. Lilgeberg at 803, Hall at 180.

This Court affirmed the Fifth Circuit's decision to vacate the judgment in Lilgeberg. Lilgeberg v. Health Services Acquisition Corp. _____ U.S._____, 108 S.Ct. 2194 (1988). In so doing, the Court observed that three factors should be assessed in determining whether an order or judgment should be vacated: 1) the risk of injustice to the parties in the case; 2) the risk that denial

of relief will produce injustice in other cases; and 3) the risk of undermining the public's confidence in the judicial process. Id. at 2204.

As in Lilgeberg, the application of these factors to the facts of the present case requires that the substantive orders and judgments of the court below be vacated. Specifically, the risk of injustice, both in this and other cases, is greater if the orders are not vacated. All of the parties, and the people of Texas, are entitled to conduct and participate in elections free from the taint of partisan bias and ex parte communications. If the orders are vacated, it cannot be said that this court implicitly approved the actions of the court below, and federal judges will be discouraged such improper action in the future. Finally, regarding the third factor, the actions of the court below, and the attendant notoriety, have

greatly eroded the public's confidence in the federal judiciary much more than the misconduct in Liljeberg. Only this Court can restore public confidence, and this can only be accomplished by taking a firm stand against the actions of Judge Nowlin by vacating the orders and judgments of the court below.

Notwithstanding the fact that Judge Nowlin was only a member of a three-judge panel, he was the deciding vote in a 2-1 decision. It is necessary to vacate the orders in question. This Court has held that when a disqualified judge casts the deciding vote in a case, the only remedy is to vacate the order resulting from the invalid, decisive vote. Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 827-28 (1986) Lavoie was the first opportunity for the Court to address the question of whether a decision of a multimember tribunal must be

vacated due to the invalid participation of one member who should have been disqualified. The Court held that, at a minimum, the underlying judgment had to be vacated when the disqualified member cast a decisive vote. Here Judge Nowlin's vote was both invalid and decisive. Thus, the underlying preliminary injunction must be vacated. See Bradshaw v. McCotter, 796 F.2d 100 (5th Cir. 1986) (applying Lavoie).

III.
THE COURT-ORDERED PLAN MAY NOT BE IMPLEMENTED PRIOR TO PRECLEARANCE

A review of the court-ordered plan reflects that it is, essentially, the FAIR plan submitted by Plaintiff-Intervenors. (Application for Stay, Appendix, Attachment G) The fact that this court has adopted this

plan does not make it a "court-drawn" plan which is not subject the terms of Section 5 of the Voting Rights Act.

In McDaniel v. Sanchez, 452 U.S. 130 (1981), this Court addressed the scope of the preclearance requirement of Section 5. In analyzing the issue, the Court quoted with approval and relied upon the following language from the Senate Committee on the Judiciary's Report regarding the 1975 amendment to the Voting Rights Act.

> "Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of coverage under the Voting Rights Act, any subsequent plan ordinarily would be subject to Section 5 review. In the typical case, the court either will direct the governmental body to adopt a new plan and present it to the court for consideration or else itself choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer its

consideration of--or selection among--any plans presented to it until such time as these plans have been submitted for Section 5 review. Only after such review should the district court proceed to any remaining fourteenth or fifteenth amendment questions that may be raised.

"The one exception where Section 5 review would not ordinarily be available is where the court, because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant

...Senate Report at 18-19.

McDaniel v. Sanchez, at 148-49. In the present case, the evidence establishes that the court in this case relied heavily on the FAIR plan rather than fashioning its own plan. Therefore, the plan must be precleared prior to implementation.

Of course, by its terms, Section 5 applies only to political subdivisions. The term "political subdivisions",

however, is broadly defined to include "all entities having power over any aspect of the electoral process". United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110, 118 (1978). Political parties and their various committees fall within the scope of Section 5. E.g. Fortune v. Kings County Democratic County Committee, 598 F.Supp. 761 (E.D.N.Y. 1984). Therefore, the FAIR Republican plan is subject to Section 5, and the court below lacked authority to order implementation of the substantially similar court plan prior to preclearance. The orders requiring implementation should be vacated, or suspended, pending preclearance of the court-ordered plan.

The above arguments aside, the fact that the court-ordered plan is essentially the FAIR plan illustrates that the court exceeded its authority in this

case. When a district court finds a Section 2 violation, and finds it necessary to adopt or fashion a plan to cure the violation, it "should not pre-empt the legislative task nor intrude upon state policy any more than necessary." White v. Weiser, 412 U.S. 783, 794 (1973) (district court erred when, in choosing between two possible plans, it failed to choose plan which most closely approximated state-proposed plan). Moreover, in Upham v. Seaman, 456 U.S. 37, 40-41 (1981) the Court held that a given legislative district should not be changed by a court plan absent a specific finding of a constitutional or statutory violation with respect to that district.

In the present case, in reviewing Senate Bill 31, the court found that proposed District 15 diluted minority voting strength and that "Districts 19 and 26 as drawn in SB 31 likely fail to meet the requirements of

Section 2." (Summary Opinion and Judgment, December 24, 1991) (Emphasis added). Thus, the court found only one violation and two likely violations. Nevertheless, the court ordered implementation of a plan in which "fully half of the Senate Districts...are substantially the same as under SB 31." (Id.) In other words, the court changed half of the 31 districts provided for in SB 31 and left the other half substantially intact, but not untouched. Given that a Voting Rights violation was found in only one district, the court below clearly exceed its authority under Upham.

Finally, the court below noted in its judgment of December 24, 1991 that any "partisan effects resulting from this effort are apparently a natural and unavoidable consequence of the court's emphasis on the interests of long-neglected minority concerns." A

comparison of the court-ordered plan with both SB 31 and the FAIR plan, however, reveals the true explanation for the sweeping changes made to the plan of the Texas Legislature. The court-ordered plan actually dilutes minority participation while seeking to achieve a partisan purpose.

By basing the court-ordered on the FAIR plan, the court exceeded its authority under Upham and has ordered implementation of the plan of a party which has not been precleared as required by Section 5. Therefore, the orders of December 24, 1991, and January 10, 1992, as amended, must be vacated.

CONCLUSION

For the foregoing reasons, this Court should reverse and vacate the three-judge court's judgments and orders of December 24, 1991, and January 10, 1991, as

amended, to the extent they require elections to proceed under the court-ordered Senate redistricting plan.